

[Cite as *Boerger v. Eagle's View Prof. Condo. Owner's Assn.*, 2009-Ohio-3678.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

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|--------------------------------|---|------------------------|
| CHRIS H. BOERGER, | : | |
| Plaintiff-Appellant, | : | CASE NO. CA2008-10-254 |
| - vs - | : | <u>OPINION</u> |
| | : | 7/27/2009 |
| EAGLE'S VIEW PROFESSIONAL PARK | : | |
| CONDOMINIUM UNIT OWNER'S | : | |
| ASSOCIATION, et al., | : | |
| Defendants-Appellees. | : | |

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV08-02-0907

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McGowan & Jacobs, Jack C. McGowan, 246 High Street, Hamilton, OH 45011, for
defendant-appellee, Robert Rockenfield

POWELL, P.J.

{¶1} Plaintiff-appellant, Chris H. Boerger, appeals the judgment from the Butler

County Court of Common Pleas dismissing his claim for fraud against defendants-appellees, Eagle's View Professional Park Condominium Unit Owner's Association (Eagle's View), Robert R. Rockenfield, and Dentprop, Inc.¹ For the reasons set forth below, we affirm the trial court's decision.

{¶2} Appellant originally filed a complaint against appellees in 1999, case number CV 1999 09 1856, and appellant amended the complaint in 2000 to include a fraud claim. Appellees moved for summary judgment, which the trial court granted, in part, and denied, in part. Appellant then filed a "Notice of Dismissal pursuant to Rule 41(A)," dismissing his claim for fraud only, leaving his other claims unaffected for purposes of appeal.² This notice of dismissal was signed by appellant's counsel only.

{¶3} Following the appeal, the case was remanded back to the trial court, and appellant amended his complaint to reinstitute the fraud claim. The matter was set for trial to begin on February 26, 2007. Less than three weeks before trial, the court disqualified appellant's key expert witness regarding critical testimony he was expected to give. Consequently, appellant filed "Plaintiff's Notice of Voluntary Dismissal Without Prejudice Pursuant to Civil Rule 41(A)," dismissing, without prejudice, his entire action. Again, the notice of dismissal was signed by appellant's counsel only.

{¶4} On February 20, 2008, appellant, having obtained new counsel, filed the complaint in the present matter, which arises out of similar facts and circumstances as

1, Although Dentprop, Inc. is listed as a party to this appeal and urges this court to affirm the trial court's decision, it appears from the record that appellant alleges fraud only against Eagle's View and Rockenfield. For ease of discussion, we will refer to the defendants subject to the fraud claim as appellees.

2 We recognize the Ohio Supreme Court has since held that "when a plaintiff has asserted multiple claims against one defendant, and some of those claims have been ruled upon but not converted into a final order through Civ.R. 54(B), the plaintiff may not create a final order by voluntarily dismissing pursuant to Civ.R. 41(A) the remaining claims against the same defendant." *Pattison v. Grainger*, 120 Ohio St.3d 142, 2008-Ohio-5276, at ¶1; *Dohme v. Eurand Am., Inc.*, 121 Ohio St.3d 277, 2009-Ohio-506.

the original case and again contains a claim for fraud against appellees. Appellees moved to dismiss the complaint based on the double-dismissal rule of Civ.R. 41(A)(1)(a), and the trial court granted the motion. Appellant now appeals the dismissal of his fraud claim, asserting one assignment of error.

{¶15} Assignment of Error No. 1:

{¶16} "THE TRIAL COURT ERRED IN DISMISSING BOERGER'S FRAUD CLAIM AGAINST EAGLE'S VIEW AND ROCKENFIELD."

{¶17} Appellant argues the trial court erred in treating the first dismissal of the fraud claim as a notice of dismissal pursuant to Civ.R. 41(A)(1)(a) and therefore erred in applying the double-dismissal rule to this case.

{¶18} "Civ.R.41(A) establishes three mechanisms by which a plaintiff can voluntarily dismiss his or her own case" without prejudice: (1) by filing a written notice of dismissal before the trial begins, without approval from the court or any adverse party; (2) by filing a stipulation of dismissal signed by all parties who have appeared in the action; or (3) by asking the trial court to dismiss the case. *Olynyk v. Scoles*, 114 Ohio St.3d 56, 2007-Ohio-2878, at ¶9, quoting *Frysjnger v. Leech* (1987), 32 Ohio St.3d 38, 42. See, also, Civ.R. 41(A)(1)(a)and (b); Civ.R. 41(A)(2).

{¶19} The double-dismissal rule contained in Civ.R. 41(A) applies only when both dismissals were notice dismissals pursuant to Civ.R. 41(A)(1)(a), and provides that when a plaintiff files two unilateral notices of dismissal regarding the same claim, the second notice of dismissal functions as an adjudication of the merits of that claim, regardless of any language in the second notice stating that the dismissal is meant to be without prejudice. *Olynyk*, at syllabus, ¶10 (citations omitted). See, also, *U.S. Bank*

Natl. Assn. v. Gullotta, Slip Opinion No. 2008-Ohio-6268, ¶24-25.

{¶10} Appellant argues the first dismissal of his fraud claim should be viewed as a stipulation of dismissal pursuant to Civ.R. 41(A)(1)(b), because all parties agreed to the dismissal prior to it being filed. Pursuant to Civ.R. 41(A)(1)(b), however, a stipulated dismissal must be "signed by all parties who have appeared in the action." Both dismissals in this case were signed by appellant's counsel only. Therefore, the double-dismissal rule applies, as both were notice dismissals pursuant to Civ.R. 41(A)(1)(a). See *West-Diehm v. Bureau of Workers' Comp.*, Richland App. No. 07-CA-18, 2008-Ohio-104, at ¶16, citing *Nolan v. Metro Builders, Inc.* (Mar. 31, 1994), Cuyahoga App. No. 64957; *Olynyk* at syllabus. Accordingly, the trial court did not err when it construed the second notice of dismissal as an adjudication on the merits and dismissed appellant's claim for fraud.

{¶11} Judgment affirmed.

YOUNG and HENDRICKSON, JJ., concur.